(1)

93-915

NO. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES LADWIG,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY

Respondent.

Petition for Writ of Certiorari to the Commonwealth of Kentucky Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

W. Robert Lotz
Counsel of Record
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38 pp

I.

QUESTION PRESENTED

1. Whether a valid waiver of a criminal defendant's right to trial by jury for a nonpetty offense under the sixth amendment to the United States Constitution can be inferred from a silent record if the defendant was represented by counsel and did not affirmatively request a jury before trial to the bench?

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES LADWIG,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY

Respondent.

Petition for Writ of Certiorari to the Commonwealth of Kentucky Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles Ladwig, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Commonwealth of Kentucky Kenton Circuit Court entered in this case on January 28, 1993.

REFERENCES TO OPINIONS BELOW

The opinion of the Commonwealth of Kentucky Kenton Circuit Court dated January 28, 1993, is unreported and appears in the appendix at page 1a.

JURISDICTIONAL STATEMENT

The judgment of the Commonwealth of Kentucky Kenton Circuit Court was entered on January 28, 1993. The order of the Commonwealth of Kentucky Court of Appeals denying discretionary review was entered on April 8, 1993. (App., page 6a). The order of the Kentucky Supreme Court also denying discretionary review on this judgment was entered on August 25, 1993. (App., page 7a). This Petition for Writ of Certiorari was filed within 90 days of this latter date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial by, an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

priviliges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY STATUTORY PROVISIONS AND PROCEDURAL RULES

Kentucky Rule of Criminal Procedure 9.26(1):

Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the Commonwealth.

KRS 29A.270(1):

Defendants shall have the right to a jury trial in all criminal prosecutions, including prosecutions for violations of

traffic laws, in the circuit and district Courts. The defendant may request a jury trial at any time prior to the time his case is called for trial. KY. REV. STAT. ANN. §29A.270(1) (Michie/Bobbs-Merrill 1992).

STATEMENT OF THE CASE

The Petitioner, Charles Ladwig, was charged in a private criminal complaint with the offenses of Assault in the 4th Degree, KY. REV. STAT. ANN. § 508.030 (Michie/Bobbs-Merrill 1988), and Terroristic Threatening, Id. at §508.080. Both offenses are Class A Misdemeanors. A Kentucky Class A Misdemeanor carries a maximum sentence of 12 months in jail. Id. at §532.090(1).

On January 29, 1992, the Petitioner, with retained counsel Bernard Blau, was arraigned before the Hon. James Godsey, Commonwealth of Kentucky Kenton District Court. On February 5, 1992, an Order was entered appointing C. Donald Wells to preside as Special Judge in the case and scheduling the matter for trial on March 4, 1992, at 10:00 a.m. On March 4, 1992, the case was sent to pretrial services for Mediation. On

August 9, 1992, an Order was entered setting the matter for trial before the Court on Thursday, September 24, 1992, in Falmouth, Kentucky.

On September 24, 1992, and September 25, 1992, the case was tried to the Hon. C. Donald Wells without a jury. Petitioner was represented by retained counsel who answered "thats correct" when the Court asked if the defendant was ready for trial. The Petitioner was acquitted of Terroristic Threatening, and convicted of Assault in the Fourth Degree.

On November 10, 1992, and November 13, 1992, the case was called for sentencing hearing. The Court found that there was no record of any prior conviction of the Defendant and sentenced him to 100 days in jail, $500.00 fine and costs. The Court entered a conditional discharge and

probation Order, ordering the Petitioner to spend 84 hours in jail, to do 50 hours of Community Service for a Governmental Agency, to be on supervised probation for 3 months, to pay costs of supervision, to pay $17.50 per day for the four days in jail, and to initiate no contact or communication with the complainant.

Counsel on Appeal and for Certiorari has reviewed the record in the case consisting of the filings in the District Court, and the tape recorded Record of Proceedings of January 29, 1992, March 4, 1992, September 24, 1992 and September 25, 1992 and represents that the record is completely silent and fails to reveal any of the following:

1. A Waiver of his right to trial by jury by the Petitioner, Charles Ladwig, written or oral.

2. A Waiver of his right to trial by jury by counsel for the Petitioner,

Charles Ladwig, written or oral.

3. A Waiver of trial by jury by counsel for the Commonwealth of Kentucky, written or oral.

4. An Approval by the Commonwealth of Kentucky District Court of the Waiver of trial by jury, written or oral.

5. Any evidence that the Petitioner was advised or addressed by the Court regarding his right to trial by jury at any stage of the proceedings.

Direct appeal of the Defendant's judgment of conviction was timely made to the Kenton Circuit Court. The statement on Appeal presented the following argument:

> The defendant's conviction must be reversed because the record fails to reveal that a knowing and voluntary waiver of the right to trial by jury was ever made by the defendant or by the Commonwealth or approved by the Court.

Federal Constitutional authority cited included the United States Constitution Amendment VI, Amendment XIV; Baldwin v. New York, 399 U.S. 66 (1970); Boykin v. Alabama, 295 U.S. 238 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Johnson v. Zerbst, 304 U.S. 438 (1938); Patton v. United States, 281 U.S. 276 (1930).

The Kenton Circuit Court's judgment affirming the District Court's decision and denying Petitioner's aforementioned ground on appeal stated in pertinent part:

> The ... [Petitioner] was represented by an attorney at all stages of these proceedings. He never requested a jury trial. He announced ready for trial at the call of his case for trial. With the ... [Petitioner's] concurrence, he was tried by the Court and was found guilty. He cannot complain because the results of the bench trial were not to his advantage.

The Petitioner then moved the Commonwealth of Kentucky Court of Appeals for discretionary review of the Circuit Court's judgment. The Court of Appeals denied discretionary review in an order dated April 8, 1993. (App., page 6a). After being denied discretionary review by the Court of Appeals, Petitioner then moved the Kentucky Supreme Court for discretionary review of the Circuit Court's judgment. The Kentucky Supreme Court denied discretionary review in an order dated August 25, 1993. (App., page 7a).

REASON FOR GRANTING THE WRIT

I. The Commonwealth of Kentucky Circuit Court decision on direct appeal holding that a defendant represented by counsel in a nonpetty criminal case had the affirmative burden to request a jury trial and inferring waiver of the Federal Jury Trial Right from a silent record conflicts directly with applicable U.S. Supreme Court Law which sets forth minimum conditions precedent to a valid waiver of this important Federal right, in particular, waiver must be of record, preferably in writing, and it must be voluntary, knowing, and intelligent.

The Federal Constitutional right to trial by jury under the VI & XIV Amendments of the United States Constitution applies to all criminal prosecutions for offenses which carry a maximum penalty of confinement of more

than six months or death. Baldwin v. New York, 399 U.S. 66, 69 (1970). Duncan v. Louisiana, 391 U.S. 145, 159 (1968). This fundamental right is applicable to the charge of Assault in the 4th Degree, KY. REV. STAT. ANN. §508.030 (Michie/Bobbs-Merrill 1992), a Class A Misdemeanor carrying a maximum sentence of 12 months in jail.

Under federal constitutional law, a waiver of a federal constitutional right is not valid under the Due Process Clause unless it is "an intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

When a Defendant is waiving his or her Federal Constitutional right to trial by jury, four conditions must be met before a valid waiver in a criminal case becomes effective: first, the waiver must be in writing; second, the government

attorney must consent to the waiver; third, the trial court must approve the waiver; and fourth, Defendant's waiver must be voluntary, knowing, and intelligent. See Patton vs. United States, 281 U.S. 276, 312-13 (1930); Singer v. United States, 380 U.S. 24, 31 (1965); Adams v. United States ex rel McCann, 317 U.S. 269, 275 (1943). See also United States v. Martin, 704 F.2d 267, 271 (6th Cir. 1983).

Perhaps the most important language in the Patton opinion deals with the fourth condition of a voluntary, knowing, and intelligent waiver of a Federal Constitutional right to trial by jury:

> Before any waiver of the right of one charged with crime to trial by jury can become effective, the consent of government counsel, and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant; and the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised

> discretion, with an eye to avoid unreasonable or undue departures from that mode of trial, or from any essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. Patton v.Unites States, 28 U.S. 276, 312-13 (1930).

Several U.S. Supreme Court Opinions have affirmed Patton in holding that waiver of important Federal Constitutional rights, including the right to trial by jury, cannot be presumed from a silent record, especially to establish the fourth condition of a voluntary, knowing, and intelligent waiver.

Boykin v. Alabama involved a direct appeal from a conviction based upon a guilty plea where the record was silent on its face as to waiver of the Federal Constitutional right to trial by jury. 295 U.S. 238, 242 (1969). Boykin approved the procedure of direct appeal of such convictions and held that the

waiver of a defendant's right to trial by jury, as one of three important Federal Rights, cannot be presumed from a silent record. Id. at 243. The Court further held that it was plain error for a trial judge to enter a judgment based upon a guilty plea without an affirmative showing that the waiver of jury trial was intelligently and voluntarily made. Id. at 242. Boykin established a requirement that the prosecution must spread upon the record of the case evidence of a valid waiver of federal constitutional rights. See Park v. Raley 61 U.S.L.W 4007, ____ (1992), McCarthy v. United States, 394 U.S. 459, 466 (1969).

Carnley vs. Cochran concerned the waiver of the Federal Constitutional right to counsel. 369 U.S. 506, 516 (1962). This Court held: "presuming a waiver from a silent record is impermissible. The record must show, or

there must be an allegation which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer." Id. at 516.

The Kentucky Circuit Court decision which held that the failure of Charles Ladwig or his counsel to request a jury trial, standing alone, constituted a valid waiver of that right, reflects Kentucky doctrine set forth in Brown v. Hoblitzel, 307 S.W.2d 739 (Ky. 1957); Williams v. Pierson, 191 S.W.2d 574 (Ky. 1945), and codified in Ky. Rev. Stat. 29.A.270(1). Although Kentucky R Cr 9.26(1) and later decisions in Short v. Commonwealth, 519 S.W.2d 828 (Ky. 1975) and Crane v. Commonwealth, 680 S.W.2d 138 (Ky. Ct. Apps. 1984), appear to mandate adherence to Federal Constitutional requirements for a valid waiver, these requirements continue to be ignored in practice by the District Courts. The

Kentucky District Judge's Benchbook setting forth misdemeanor arraignment procedure does not require advice to the defendant of jury trial right or how to assert it, nor any procedure for obtaining jury trial waivers before proceeding to bench trials. (App., page 10a). In Kenton County the Court Standard Form requires filing by a Defendant of a written motion for jury trial before one is granted. (App., page 8a).

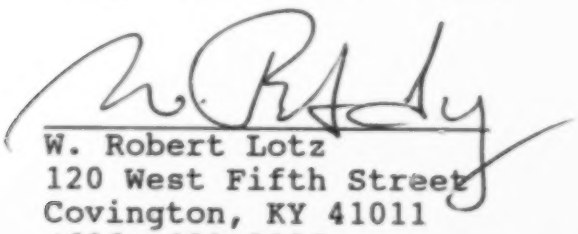
Because of these procedures, which continue to exist, Charles Ladwig was tried, convicted and sentenced to jail by a judge for a nonpetty offense without an oral or written waiver of jury trial by himself, his attorney, the prosecutor, or the Court ever appearing of record. There is not even a record of the jury trial right ever being discussed or explained to him.

CONCLUSION

The total omission by the Kentucky trial court of adherence to Constitutionally mandated procedure for obtaining and approving a waiver of this defendant's right to trial by jury requires reversal of his conviction on direct appeal as a matter of important Federal Constitutional Law. The issue of "silent waivers" has not been clearly addressed under State Law or Federal Law by the Kentucky Court of Appeals or by the Kentucky Supreme Court. Both of these Courts have declined discretitionary review in this case and thereby continue to allow Kentucky District Courts to reduce jury trial calenders by practicing their game of "Don't Tell - Don't Ask". For these

reasons a writ of certiorari should be issued to review the judgment of the Kenton County, Kentucky Circuit Court.

Respectfully submitted,



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FILE STAMPED:
ENTERED KENTON CIRCUIT COURT:
JANUARY 28, 1993

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
THIRD DIVISION

CASE NO. 92-XX-00048

CHARLES LADWIG **APPELLANT**

VS.

COMMONWEALTH OF KENTUCKY **APPELLEE**

APPEAL FROM KENTON DISTRICT COURT
HON. C. DONALD WELLS, SPECIAL JUDGE
CASE NO. 92-M-00142

ORDER AND OPINION AFFIRMING

This is a criminal appeal filed by Charles Ladwig, Defendant below, from a Judgment and Sentence of the Kenton District Court entered November 13, 1992, which found him guilty of violating KRS 508.030, Assault in the Fourth Degree, and which sentenced him

to 100 days in jail and a $500.00 fine. The 96 days in jail were probated and he was ordered to spend 84 hours in jail, and to perform 50 hours of community service, and he was placed on probation for two (2) years, supervised for three (3) months, to pay the costs of supervision, and to pay $17.50 per day for the four (4) days in jail, and to initiate no contact or communication with Mark Modlin.

1. Appellant's first ground on appeal is that the record does not contain a knowing and voluntary waiver of the right to a trial by jury by the Appellant. That RCr 9.26 (1) and KRS 29A.270 (1) require a jury trial in the Appellant's case. That since the Appellant was not tried by a jury, and

since he did not waive his right to a jury trial, this case should be remanded for a jury trial.

RCr 9.26 (1) states that cases required to be tried by a jury shall be so tried unless waived.

KRS 29A.270 (1) states that defendants shall have the right to a jury trial in all criminal prosecutions, in circuit and district court. The defendant may request a jury trial at any time prior to the time his case is called for trial.

The Appellant was represented by an attorney at all stages of these proceedings. He never requested a jury trial. He announced ready for trial at the call of his case for trial. With the Appellant's concurrence, he was

tried by the Court and was found guilty. He cannot complain because the results of the bench trial were not to his advantage.

2. Appellant's next ground of appeal is that the evidence presented at his trial was insufficient to support a finding that he intended to cause physical injury to Mark Modlin, which is an essential element of Assault in the Fourth Degree.

The evidence heard by the Trial Court was sufficient to support the conviction by a finding that the Appellant caused physical injury to the victim.

3. Appellant's final ground of appeal is that the Trial Court erred in overruling Appellant's request to

participate in the Kenton County Diversion Program.

According to the rules of the Program, the Appellant was not eligible to participate therein.

ORDER

IT IS, THEREFORE, ORDERED by the Court that the Judgment of the Kenton District Court is affirmed.

January 28, 1993.

/s/ Daniel J. Goodenough
DANIEL J. GOODENOUGH, JUDGE
KENTON CIRCUIT COURT
THIRD DIVISION

cc: Hon. Stephen P. Huddleston,
Special Prosecutor
Hon. Robert Lotz,
For Appellant
Hon. C. Donald Wells,
Special Judge
Kenton District Court Clerk

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

93-CA-517-D

CHARLES LADWIG — MOVANT

V. — ON MOTION FOR DISCRETIONARY REVIEW FROM KENTON CIRCUIT COURT ACTION NO. 92-X-48

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * * * *

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: LESTER, Chief Judge; EMBERTON and WILHOIT, Judges

Having considered the motion for discretionary review and the response thereto, and being otherwise sufficiently advised, the Court ORDERS that the motion be, and it is hereby DENIED.

ENTERED: April 8, 1993

/s/ Charles B. Lester
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY

93-SC-307-D
(93-CA-517-D)

CHARLES LADWIG **MOVANT**

V. **KENTON CIRCUIT COURT**
92-X-48

COMMONWEALTH OF KENTUCKY **RESPONDENT**

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 25, 1993

/s/ Robert F. Stephens
CHIEF JUSTICE

_____ **DIVISION**

CASE NUMBER _____

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS

DEFENDANT

MOTION FOR JURY TRIAL

COMES NOW THE DEFENDANT, BY AND THROUGH COUNSEL, AND RESPECTFULLY MOVES THIS COURT FOR A TRIAL BY JURY IN THE AFOREMENTIONED MATTER.

_____

ATTORNEY FOR THE DEFENDANT

NOTICE

PLEASE TAKE NOTICE THAT THIS MATTER WILL BE ON FOR HEARING AT THE COURT'S CONVENIENCE.

_____

CERTIFICATION

I, HEREBY CERTIFY THAT I HAVE SENT A TRUE COPY OF THE JURY DEMAND AND NOTICE TO HON. JON ELFERS, COUNTY ATTORNEY, 3RD FLOOR, COUNTY BLDG., COV., KY, THIS THE _____ DAY OF _____, 19_____.

1.15 INITIAL APPEARANCE OF DEFENDANT CHARGED WITH A MISDEMEANOR OR VIOLATION OFFENSE [1]

1. Ask the defendant:

   a. name

   b. address

   c. date of birth

2. Advise the defendant:

   a. of the charge against him/her (RCr 3.05)

   b. of right to remain silent (RCr 3.05)

   c. that any statement made by him/her may be used against them (RCr 3.05)

   d. that defendant has a right to a trial (RCr 3.05)

   e. of defendant's right to have counsel (RCr 3.05)

---

1. KENTUCKY DISTRICT JUDGES BENCHBOOK, Published by AAAA Administrative Office of the Courts, Frankfort, Kentucky. Revised December 1, 1989.

3. Determine whether the charge equires that defendant has he assistance of counsel:

a. if the offense is punishable by a fine in excess of $500 or by confinement (KRS 31.100(4)(b)), defendant must be advised of right to appointed counsel if defendant is a "needy person" (KRS 31.110). A "needy person" means a person who is unable to provide for the payment of an attorney and all other necessary expenses of representation. KRS 31.100(3). NOTE: Concerning the appointment of counsel, see 1.20.

b. appoint counsel where appropriate.

4. Ask the defendant how he/she intends to plead:

   a. if guilty, proceed to section on Guilty Pleas, 1.25.

   b. if not guilty, set a trial date. Defendant must be given opportunity to consult counsel. (RCr 3.07, 3.05, 9.02).

5. Review Conditions of Release if defendant remains in custody (RCr 3.05).

(2)

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CHARLES LADWIG

Petitioner

versus

COMMONWEALTH OF KENTUCKY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTON COUNTY KENTUCKY
CIRCUIT COURT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNSEL FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

WHETHER THE KENTON COUNTY KENTUCKY CIRCUIT COURT CORRECTLY DECLINED TO REVERSE PETITIONER'S CONVICTION AND GRANT HIM A NEW TRIAL BASED ON THE SIXTH AMENDMENT'S RIGHT TO TRIAL BY JURY WHERE PETITIONER WAS REPRESENTED BY COUNSEL, ABOUT WHOM COMPLAINT HAS NEVER BEEN MADE, AND A REQUEST FOR A JURY WAS NEVER MADE AT ANY STAGE OF THE PROCEEDINGS IN THE STATE TRIAL COURT.

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NO. 93-915

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES LADWIG

Petitioner

versus

COMMONWEALTH OF KENTUCKY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTON COUNTY KENTUCKY
CIRCUIT COURT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Kenton County Kentucky Circuit Court is correctly set forth in slip form in the petitioner's appendix to his petition.

JURISDICTION

The jurisdictional facts presented by the petitioner are correct.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner correctly states the constitutional provisions involved in this case.

COUNTERSTATEMENT OF THE CASE

This case arose as the result of petitioner's criminal actions on Wednesday, December 18, 1991, at the United Methodist Church at Lakeside Park in Kenton County, Kentucky. The petitioner is married to the ex-wife of the victim in this case, Mark Modlin. The victim and his ex-wife share a child, Bryson Modlin, who in 1991 was five years of age. In a dispute over the child on December 18, 1991 petitioner assaulted the victim and threatened him. The physical injuries inflicted by the petitioner upon the victim in this case were serious enough to require medical care and treatment.

BEST AVA

As a result of the events of December 18, 1991 the petitioner was charged by way of criminal complaint with the crime of assault in the fourth degree in violation of Kentucky Revised Statute 508.030 and terroristic threatening in violation of Kentucky Revised Statute 508.080. Pursuant to Kentucky Revised Statute 532.090 both offenses carried a maximum sentence of imprisonment of twelve months in jail.

The petitioner was subsequently arraigned before the Kenton District Court on or about January 29, 1992. On February 5, 1992 an order was entered by the Kenton Circuit Court appointing the Honorable C. Donald Wells to preside over the pending criminal case as a special judge and scheduled the matter for trial commencing on March 4, 1992 at 10 a.m. However, on March 4, 1992 the case did not proceed to trial as previously ordered and was diverted for possible mediation. However, attempts at

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mediation of the matter proved unsuccessful as on August 9, 1992 an order was entered in the Kenton District Court setting the case for trial on Thursday, September 24, 1992 before the Kenton District Court.

On September 24, 1992 and September 25, 1992 this case was tried before the Honorable C. Donald Wells without a jury. The petitioner was ultimately acquitted of the crime of terroristic threatening but was adjudged guilty of the crime of assault in the fourth degree as defined by Kentucky law.

Final judgment and sentence of the Kenton District Court was entered on November 13, 1992. The Kenton District Court adjudged petitioner guilty of the offense of assault in the fourth degree in violation of Kentucky Revised Statute 508.030 and sentenced him to 100 days in jail and imposed a $500 fine. The trial court entered a conditional discharge and probation order, ordering the petitioner to

spend 84 hours in jail and to perform 50 hours of community service. Further, petitioner was placed on probation for two years, to be on supervised probation for three months, was further ordered to pay the costs of his supervision, was directed to pay $17.50 per day for his four days in jail, and was ordered to initiate no contact or communication with the victim in this case, Mark Modlin.

At that juncture, petitioner initiated his one appeal as a matter of right to the Kenton County Kentucky Circuit Court from the judgment of the inferior trial court. Sitting as an appellate court for purposes of the direct appeal of petitioner's misdemeanor conviction, the Kenton County Kentucky Circuit Court rejected petitioner's claim that petitioner was entitled to a new trial in the Kenton County Kentucky District Court since the case was tried without a jury. In rejecting petitioner's complaint, the Kenton County Kentucky Circuit

Court observed that petitioner "was represented by an attorney at all stages of these proceedings. He never requested a jury trial. He announced ready for trial at the call of his case for trial. With the appellant's concurrence, he was tried by the court and was found guilty. He cannot complain because the results of the bench trial were not to his advantage." (Petitioner's Appendix, 2a-3a). The Kenton County Kentucky Circuit Court also rejected petitioner's claims that the evidence presented at his bench trial was insufficient to support a finding that he intended to cause physical injury to the victim - an essential element of the crime of assault in the fourth degree. (Petitioner's Appendix, 4a-5a).

The Court of Appeals of Kentucky subsequently denied the petitioner's motion for a discretionary review of the decision of the Kenton County Kentucky Circuit Court in an order entered on April 8, 1993. Thereafter, the

Supreme Court of Kentucky denied the petitioner's request for a discretionary review of this case in an order entered on August 25, 1993. Undeterred, petitioner's petition for a writ of certiorari to review the judgment of the Kenton County Kentucky Circuit Court in this Court then followed.

Additional facts shall be developed, as warranted, in the Argument section of this brief in opposition to the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

Petitioner has never complained that he in fact wanted something other than a bench trial. He simply argues that the record fails to reflect a waiver of his right to a jury to decide his case that would exist if he had decided to forego all his constititutional rights by entering a plea of guilty. The state courts declined to reverse the conviction and order a new trial since petitioner's attorney,

about whom complaint has never been made, failed to make a request for a jury prior to commencement of the bench trial or raise the issue by way of trial objection or post-trial motion. Petitioner is bound by the acts of his attorney, whom the law strongly presumes was acting as able and competent counsel.

ARGUMENT

THE PETITIONER HAS FAILED TO DEMONSTRATE THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE KENTON COUNTY KENTUCKY CIRCUIT COURT.

The petitioner has failed to demonstrate that there are special and important reasons why this Court ought to grant a writ of certiorari to review the unpublished judgment of the Kenton County Kentucky Circuit Court. The petition for a writ of certiorari fails to demonstrate why this Court ought to exercise its discretion in favor of granting the writ since the petition fails to demonstrate that there are

special and important reasons therefor. Fay v. Noia, 372 U.S. 391 (1963); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

In this case, petitioner does not argue that the Kentucky trial court incorrectly denied his request for a trial by jury. In fact, he does not even argue that he actually desired a trial by jury in the Kenton County Kentucky District Court. Nowhere in his petition is there any claim that he ever wanted something other than a bench trial. Instead, he claims that the Kentucky courts in his direct appeal should have granted him a new trial simply because there was no record of an express waiver of the right to trial by jury akin to that which would be found in the record of a case when a criminal defendant foregoes all of his constitutional rights by entering a plea of guilty. For the reasons that follow, the Commonwealth shall demonstrate that petitioner's argument is without merit.

At the outset, the Commonwealth recognizes that it is undisputed that the petitioner had the right to the trial of his case in the Kenton County Kentucky District Court by a jury of his peers had he so requested. Pursuant to Kentucky Revised Statute 29A.270(1) petitioner was entitled to "request a jury trial at any time prior to the time his case is called for trial." In this case, petitioner never once made any request, either written or oral, for a trial by jury as was his right before his case was called for trial. Nor did he make any sort of objection in the record wherein he objected to proceeding to trial without a jury. Further, the record is devoid of any sort of post-trial motion wherein petitioner raised any complaint at all about trying his case before the trial judge without a jury in the Kenton County Kentucky District Court. There was never any assertion of the right to a trial by jury, in either the form of

a pre-trial request or trial objection or post-trial motion, despite the fact that it is undisputed that petitioner was represented by experienced counsel at all times throughout the proceedings in the Kenton County Kentucky District Court.

That the Kentucky appellate courts declined to award petitioner a new trial based on his claim is hardly surprising given the facts and circumstances of this case. As this Court has observed, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Yakus v. United States, 321 U.S. 414, 444 (1944). The principle that a constitutional right may be forfeited in a criminal case by the failure to make a timely assertion of that right is just as applicable in state court proceedings

as it is in cases in the federal courts. Francis v. Henderson, 425 U.S. 536 (1976).

The principle recognized by this Court in Yakus has been consistently observed in subsequent decisions by this Court. A defendant in a criminal case has no constitutional right to have an Article III judge preside at his jury selection if he has raised no objection to the judge's absence. Peretz v. United States, 501 U.S. ___ (1991). The most basic constitutional rights of criminal defendants are subject to waiver. Levine v. United States, 362 U.S. 610, 619 (1960)(failure to object to closing of courtroom is waiver of right to public trial); Segurola v. United States, 275 U.S. 106, 111 (1927)(failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure).

Surely no right is more basic than the right of a criminal defendant to be physically present at all stages of a criminal trial. This

Court, in United States v. Gagnon, 47 U.S. 522 (1985) recognized that the failure by a defendant to invoke his right to be present constitutes a valid waiver of that right. This Court recognized that such an analysis comports "with the every day practicalities of conducting a trial." Gagnon, at 529. A defendant must assert his claim during the trial proceedings and may not raise it for the first time on appeal following the entry of a final judgment of conviction. (Id.).

The fundamental principle set out in Yakus that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of that right more than fifty years ago is particularly applicable to this case since petitioner was represented by counsel throughout the proceedings in the state trial court. In our system of representative litigation, each party is bound by the acts of his lawyer-agent. Link

v. Wabash Railroad Co., 370 U.S. 626, 634 (1962); Irwin v. Veterans Administration, 498 U.S. ____ (1990). That principle is no less applicable to this case simply because this is a criminal case. There exists a presumption in criminal cases that a defendant's attorney is conscious of the duties to his accused client and that the attorney conscientiously endeavored to discharge his obligation in a competent manner. United States v. Cronic, 466 U.S. 648, 658 (1984). There is in our law a strong presumption that an attorney is "presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 446 U.S. 668, 690 (1984). Significantly, the petitioner has never alleged that his attorney's performance was so constitutionally deficient in the state trial court that it resulted in a deprivation of his right to a trial by jury. Instead, he has never

made any complaint about his attorney's performance and simply continues to allege that he should have been granted a new trial because the record was devoid of the sort of showing necessary when a defendant enters a plea of guilty and foregoes all of his constitutional rights.

Petitioner's reliance upon Boykin v. Alabama, 295 U.S. 238 (1969) is misplaced. Petitioner contends that Boykin required the Kentucky courts to provide him a new trial since the waiver of a trial by jury required the same sort of showing required when a defendant waives all of his rights by entering a plea of guilty. Boykin involved a situation where a criminal defendant was giving up each and every one of his federal constitutional rights pursuant to a plea of guilty and was ultimately sentenced to death therefor. That situation is a far cry from the situation in this case where the petitioner was represented by competent and

experienced counsel throughout every stage of the proceedings in the state trial court.

It is one thing when a defendant short circuits the legal process altogether by entering a plea of guilty and quite another when he simply fails to timely assert one of his many constitutional guarantees when represented by competent and able counsel during the trial proceedings. The sort of "everday practiclaties of conducting a trial" considered critical in Gagnon counsel against the notion advanced by petitioner that everytime a defense attorney foregoes a trial right grounded in the constitution there must be an express personal waiver of that right by the defendant himself. Since "[a] waiver of trial by jury is usually for tactical reasons when a defendant is represented by counsel", Thompkins v. United States, 251 A.2d 636 (D.C. App. 1969), this Court ought not ignore the important fact that

petitioner was represented by counsel about whom complaint has never been made.

Petitioner's reliance upon Johnson v. Zerbst, 304 U.S. 458 (1938) and Carnley v. Cochran, 369 U.S. 506 (1962) is equally misplaced as those cases involved situations where there was no adequate showing in the record as to the waiver of the right to counsel. In this case, petitioner was represented by counsel whose performance is strongly presumed to have been competent and conscientious and about whom complaint has never been made Petitioner's attempt to rely upon language found in Patton v. United States, 28 U.S. 276, 312-313 (1930) regarding the waiver of a jury is also without merit. The language relied upon by petitioner must be understood in light of the supervisory power of this Court over the lower federal courts since this Court has recognized "that the states have adopted a variety of procedures relating to the waiver of

jury trials in state criminal cases." Singer v. United States, 380 U.S. 24, 36 (1965). Complaint has never been made by the petitioner about his attorney's performance or that somehow the trial court impermissibly deprived him of his constitutional right to a trial by jury. Instead, he simply complains that the same sort of showing should be made on the record in this case as would be made if he had decided to forego all of his federal constitutional rights by entering a plea of guilty. Given the nature of the petitioner's allegations on appeal in the state courts it is hardly surprising that the state courts declined to grant petitioner a new trial in the Kenton County Kentucky District Court.

If petitioner believes that his attorney's performance was so constitutionally deficient that it resulted in the deprivation of his right to a trial by jury or that somehow the trial court itself impermissibly deprived him of

his right to a trial by jury then he is still entitled to raise such allegations by way of a collateral attack on the criminal judgment pursuant to Kentucky Rule of Criminal Procedure 11.42. It is well settled that Kentucky's procedure for collateral attacks on a criminal conviction permit litigation of claims involving an alleged violation of a constitutional right. Kiper v. Commonwealth, 415 S.W.2d 92, 94 (Ky. 1967). Based on the record on appeal in the direct appeal the Kentucky courts, not surprisingly, declined to grant a new trial since the record reflected that petitioner was represented by competent and able counsel and that no request for a trial by jury was ever made by way of a pre-trial motion, a trial objection, or a post-trial motion.

CONCLUSION

For the foregoing reasons the Commonwealth respectfully submits that the petition for a writ of certiorari to the Kenton

County Kentucky Circuit Court be denied. Review by this honorable Court is not warranted as petitioner has failed to demonstrate special and important reasons for this Court to exercise its discretion in favor of granting a writ of certiorari.

Respectfully submitted,

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